Yu Sheng Meng (a child represent by his litigator, Yu Meng Queng) v Ketua Pengarah Pendaftaran Negara & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 25–117–06 OF 2014
ASMABI MOHAMAD J
18 AUGUST 2015

Constitutional Law — Citizenship — Application for — Child born to Malaysian father and Indonesian mother and registered as non-citizen — Child taken for adoption and adopting parent applied for declaration as Malaysian citizen — Whether adopting parent lawful parent — Whether adoption can change citizenship status of child — Whether child illegitimate — Federal Constitution arts 14(1)(b) & 15(2)

The plaintiff was born to a Malaysian father and an Indonesian mother. The birth was registered pursuant to s 13 of the Births and Deaths Registration Act 1957, a specific provision applicable to illegitimate children and the plaintiff's status was a non-citizen as the plaintiff's biological mother was a non-citizen of Malaysia. The plaintiff was adopted by one Yu Meng Queng ('YMQ') and YMQ applied for citizenship registration but the same was rejected. YMQ had on behalf of the plaintiff applied to the first defendant for a citizenship status but the application was turned down due to YMQ's inability to show a valid record of the registration of the plaintiff's parents' marriage. The plaintiff sought from the court a declaration that the plaintiff was a Malaysian citizen. The defendants filed the present application to strike out the plaintiff's application. The issues that arose were whether the plaintiff's claim disclosed any reasonable cause of action under arts 14(1)(b) and/or 15(2) of the Federal Constitution ('Constitution'); whether the plaintiff's application for specific reliefs was an abuse of the court process; whether the prayers sought by the plaintiff was a justiciable matter; (iv) whether the final decision by the federal government had been made by the Minister; and whether the plaintiff had exhausted all alternative remedy provided under s 44 of the Specific Relief Act 1950.

Held, striking out the plaintiff's originating summons:

(1) The plaintiff did not fulfil the requirement that 'his parent, or one of his parents' is a citizen of Malaysia or permanently resident in Malaysia as envisaged by art 14 read together with Part II of the Second Schedule of the Constitution, for purposes of citizenship by operation of law to be granted to him. At the time of the plaintiff's birth, the plaintiff's mother as stipulated in the birth certificate was an Indonesian citizen and not a

Malaysian citizen or a permanent resident of Malaysia. Thus, as the reference was made to the plaintiff's biological mother, art 14(1)(b) of the Constitution would not at all operate for the benefit of the plaintiff (see paras 11 & 12(l)).

(2) The plaintiff's status of citizenship could not be considered under art 15(2) of the Constitution as the biological mother had never married the plaintiff's biological father. The plaintiff had not made any averment pertaining to the status of his parents' marriage or provided evidence that both his biological parents had been legally married. There was no evidence provided that the provision of s 3 of the Legitimacy Act 1961 had been satisfied. Thus, the plaintiff was deemed to be an illegitimate person under the law. Articles 14(1)(b) and 15(2) of the Constitution could not be invoked by the plaintiff to claim for citizen of Malaysia by operation of law. Therefore, the plaintiff's application for declarations that he was a citizen by operation of law or by registration was obviously unsustainable (see paras 12(h), 13(d) & 13(f)).

(3) The appeal by the minister made on behalf of the federal government was a final decision. In the present case, the plaintiff had not shown that there was in fact a decision made by the minister. The originating summons filed by the plaintiff was therefore premature. Further, the decision under Part III of the Constitution, was a matter which was non-justiciable as provided under s 2, Part III, Second Schedule of the Constitution. The court would not entertain an application if the subject matter of the review is one which by settled law is non-justiciable (see paras 22–24).

(4) The plaintiff had the duty to show that the plaintiff had exhausted all the avenues provided by the specific provisions pertaining to the relief sought before applying to the court. Hence, the relief sought under art 15A of the Constitution was an abuse of the process of the court as it was a non-justiciable matter on which this court did not have any jurisdiction to hear. Thus, this was a proper case for this court to exercise its power under O 18 r 19 of the Rules of Court 2012 to strike out the originating summons (see paras 25–27).

[Bahasa Malaysia summary

Plaintif dilahirkan daripada bapa yang berwarganegara Malaysia dan ibu yang berwarganegara Indonesia. Kelahiran didaftarkan menurut s 13 Akta Pendaftaran Kelahiran dan Kematian 1957, peruntukan spesifik yang diguna pakai kepada kanak-kanak tak sah taraf dan status plaintif adalah bukan warganegara kerana ibu kandung plaintif bukan warganegara Malaysia. Plaintif diambil sebagai anak angkat oleh seorang yang bernama Yu Meng Queng ('YMQ') dan YMQ memohon untuk pendaftaran kewarganegaraan tetapi ianya ditolak. YMQ telah bagi pihak plaintif memohon kepada defendan pertama untuk status kewarganegaraan tetapi permohonan ditolak

kerana YMQ tidak dapat menunjukkan rekod sah pendaftaran perkahwinan ibubapa plaintif. Plaintif memohon daripada mahkamah perisytiharan bahawa plaintif adalah warganegara Malaysian. Defendan-defendan memfailkan permohonan ini untuk membatalkan permohonan plaintif. Isu-isu yang berbangkit adalah sama ada dakwaan plaintif mengemukakan apa-apa kausa munasabah di bawah perkara 14(1)(b) dan/atau 15(2) Perlembagaan Persekutuan ('Perlembagaan'); sama ada permohonan plaintif untuk relief spesifik adalah penyalahgunaan proses mahkamah; sama ada permohonan-permohonan yang dipohon oleh plaintif adalah perkara yang berjustifikasi; sama ada keputusan muktamad kerajaan persekutuan telah dibuat oleh menteri; dan sama ada plaintif telah menggunakan kesemua remedi alternatif yang diperuntukkan di bawah s 44 Akta Relief Spesifik 1950.

Diputuskan, membatalkan saman pemula plaintif:

(1) Plaintif tidak memenuhi kehendak bahawa 'his parent, or one of his parents' adalah warganegara Malaysia atau penduduk tetap di Malaysia seperti yang dibayangkan oleh perkara 14 dibaca bersama Bahagian II Jadual Kedua Perlembagaan, bagi tujuan kewarganegaraan dengan proses undang-undang diberikan kepadanya. Pada masa kelahiran plaintif, ibu plaintif seperti yang dinyatakan dalam sijil kelahiran adalah warganegara Indonesia dan bukan warganegara Malaysia atau penduduk tetap Malaysia. Oleh itu, memandangkan rujukan dibuat kepada ibu kandung plaintif, perkara 14(1)(b) Perlembagaan tidak sama sekali beroperasi bagi faedah plaintif (lihat perenggan 11 & 12(l)).

(2) Status kewarganegaraan plaintif tidak boleh dipertimbangkan di bawah perkara 15(2) Perlembagaan kerana ibu kandung tidak pernah berkahwin dengan bapa kandung plaintif. Plaintif tidak pernah membuat apa-apa hujahan berkaitan kepada status perkahwinan ibubapanya atau memberikan keterangan bahawa kedua-dua ibubapa kandungnya telah berkahwin secara sah. Tidak terdapat keterangan yang diberikan bahawa peruntukan s 3 Akta Kesahtarafan 1961 telah dipenuhi. Oleh itu, plaintif adalah dianggap sebagai orang tak sah taraf di sisi undang-undang. Perkara 14(1)(b) dan 15(2) Perlembagaan tidak dapat dibangkitkan oleh plaintif untuk menuntut kewarganegaraan Malaysia melalui operasi undang-undang. Oleh itu, permohonan plaintif untuk perisytiharan bahawa dia adalah warganegara melalui operasi undang-undang atau melalui pendaftaran adalah jelas tidak dapat dipertahankan (lihat perenggan 12(h), 13(d) & 13(f)).

(3) Rayuan oleh menteri yang dibuat bagi pihak kerajaan persekutuan merupakan keputusan muktamad. Dalam kes ini, plaintif tidak menunjukkan bahawa sebenarnya terdapat keputusan yang dibuat oleh menteri. Saman pemula yang difailkan oleh plaintif oleh itu adalah prematang. Selanjutnya, keputusan di bawah Bahagian III

Perlembagaan, adalah perkara yang tidak berjustifikasi seperti yang diperuntukkan di bawah s 2 Bahagian III Jadual Kedua Perlembagaan. Mahkamah tidak akan mendengar permohonan jika perkara yang disemak adalah sesuatu yang dengan undang-undang tetap adalah tidak berjustifikasi (lihat perenggan 22–24).

(4) Plaintif mempunyai kewajipan untuk menunjukkan bahawa plaintif telah menggunakan kesemua peluang yang diperuntukkan oleh peruntukan spesifik berkaitan kepada relief yang dipohon sebelum memohon kepada mahkamah. Maka, relief yang dipohon di bawah perkara 15A Perlembagaan adalah penyalahgunaan proses mahkamah kerana ia adalah perkara yang tidak berjustifikasi yang mana mahkamah ini tidak mempunyai apa-apa bidang kuasa untuk mendengar. Oleh itu, ini adalah kes betul bagi mahkamah ini untuk melaksanakan kuasanya di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan saman pemula (lihat perenggan 25–27).]

Notes

For a case on application for, see 3(2) *Mallal's Digest* (5th Ed, 2015) para 2397.

Cases referred to

Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur [1976] 2 MLJ 156, FC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (folld)

D (an infant), Re [1959] 1 QB 229, CA (folld)

Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia [2012] 9 MLJ 573, HC (folld)

Gasing Height Sdn Bhd v Aloyah bte Abd Rahman & Ors [1996] 3 MLJ 259, HC (folld)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114, SC (folld)

Ketua Pengarah Buruh v Britania Brands (Malaysia) Sdn Bhd [2010] MLJU 504, CA (refd)

Kuluwante (An Infant) v Government of Malaysia & Anor [1978] 1 MLJ 92 (refd)

Lembaga Lebuhraya Malaysia v Cahaya Baru Development Berhad (Dissenting avail MLJU (09) 0523) [2009] MLJU 546, CA (refd)

Meenal w/o Muniyandi, In Re [1980] 2 MLJ 299 (refd)

Metal Industry Employees Union v Registrar of Trade Unions & Ors [1976] 1 MLJ 220, FC (refd)

Nedunchelian v Uthiradam v Nurshafiqah Mah Singai Annal & Ors [2005] 2 CLJ 306, HC (folld)

Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor [2004] 2 MLJ

648; [2004] 2 CLJ 416, HC (folld)
Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385, SC (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)

Legislation referred to

Adoption Act 1952 ss 6, 9
Births and Deaths Registration Act 1957 s 13
Federal Constitution arts 14, 14(1)(b), 15, (1), (2), 15A, 16, 16A, 18, 19, 22, 31, Second Schedule, Part II, s 1(a), Part III, ss 2, 4, 17, 19
Legitimacy Act 1961 s 3
National Registration Act 1959 s 4
National Registration Regulations 1990 r 11
Rules of Court 2012 O 18 r 19, 19(1)(a), (1)(b), (1)(d)
Rules of the High Court 1980 O 18 r 19(1)
Specific Relief Act 1950 s 44

Annou Xavier (Lim Fang Say with him) (Azri, Lee Swee Seng & Co) for the plaintiff.
Maisarah bt Juhari (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

Asmabi Mohamad J:

THE APPLICATION

[1] This was an application filed by the defendants to strike out the plaintiff's originating summons and affidavit in support dated 31 July 2014 under O 18 r 19(1)(a), (1)(b) and/or (1)(d) of the Rules of Court 2012 ('the ROC') and or under the inherent jurisdiction (encls 4 and 5 respectively).

[2] Enclosure 4 was premised on the grounds that the plaintiff's application disclosed no reasonable cause of action, scandalous, frivolous and vexatious and an abuse of process of the court.

[3] Vide the plaintiff's originating summons dated 11 June 2014 the plaintiff sought from this court the following reliefs:

(a) a declaration that the plaintiff is a Malaysian citizen under arts 14(1)(b) and/or 15(2) of the Federal Constitution ('the FC');

(b) a declaration that the plaintiff is a Malaysian citizen under art 15A of the FC;

(c) an order to direct the defendants to issue a new birth certificate stating that the plaintiff is a Malaysian citizen within 21 days from the date of the order of this application;

(d) an order to compel the first defendant to register and update the plaintiff's name in the register as provided for under s 4 of the National Registration Act 1959 (Act 78) and r 11 of the National Registration Regulations 1990 ('the said registration rules'); and

(e) an award of damages including exemplary damages on the defendants' conduct, which are null, void and unconstitutional in refusing to issue a new birth certificate disclosing that the plaintiff, is a Malaysian citizen.

DOCUMENTATION

[4] For the purpose of the hearing of this case the following documents were filed and referred to:

(a) the plaintiff's originating summons dated 11 June 2014 (hereinafter referred to as 'the OS');

(b) the plaintiff's affidavit in support affirm on 9 June 2014 by Yu Meng Queng (hereinafter referred to as 'encl 2');

(c) notice of application under O 18 rr 19 (1)(a), 1(b) and/or 1(d) of the ROC dated 31 July 2014 ('encl 4');

(d) affidavit in support affirmed by Maisarah binti Juhari on 30 July 2014 (hereinafter referred to as 'encl 5');

(e) the plaintiff's affidavit in reply affirmed by Yu Meng Queng on 26 August 2014 ('encl 6');

(f) the defendant's affidavit in reply affirmed by Maisarah bt Juhari on 15 September 2014 ('encl 7'); and

(g) the plaintiff's affidavit in reply affirmed by Yu Meng Queng on 29 September 2014 ('encl 8').

BRIEF BACKGROUND

[5] The brief background of the case had been well illustrated by the learned senior federal counsel in her written submission. I could not do any better than to adopt the brief background as submitted subject to some modifications as follows:

(a) the plaintiff is a minor, who was born on 19 May 2008 in Penang and at the time of birth had been named Yap Chu Fu;

(b) the plaintiff's biological father, Yap Boon Kheng is a Malaysian citizen and his mother, Sania Ananda is an Indonesian citizen;

(c) the plaintiff's birth certificate was issued under the Births and Deaths Registration Act 1957. In the plaintiff's birth certificate the citizenship of both the biological father and mother had been specified therein, the father a Malaysian citizen and the mother a non-Malaysian citizen (see exh 'Y-1' of encl 2);

(d) there was no valid record on the plaintiff's birth certificate to show that the marriage of the plaintiff's biological father and mother was registered. The application for registration was made pursuant to s 13 of the Births and Deaths Registration Act 1957 (see endorsement in exh 'Y-1' of encl 2). On the face of the plaintiff's birth certificate, the birth was registered pursuant to s 13 of the Births and Deaths Registration Act 1957 (Act 299) which is a specific provision applicable to illegitimate child;

(e) the plaintiff's birth certificate clearly showed that the plaintiff's status is a non-citizen as the plaintiff's biological mother is a non-citizen of Malaysia;

(f) the plaintiff was adopted by one Yu Meng Queng ('YMQ') on 24 September 2008 pursuant to an adoption order obtained from the Sessions Court of Georgetown vide Petition No 58–15 of 2008. As a consequence of the order from the sessions court, the new birth certificate was issued by the first defendant's office and the adopter's name ie YMQ had been inserted. The plaintiff was granted the status of permanent resident;

(g) YMQ then had made an application pursuant to art 15A of the FC on 7 October 2008 to obtain citizenship by way of registration and the same was rejected on 30 September 2010;

(h) YMQ then made a second application on behalf of the plaintiff under the same provision of the FC on 10 October 2011, and this application was also rejected on 15 January 2013;

(i) the plaintiff had filed an appeal to the Minister of Home Affairs on 27 February 2013. Up to this date, the Minister of Home Affairs has not given any feedback pertaining to YMQ's appeal status;

(j) YMQ had on behalf of the plaintiff applied to the first defendant for a citizenship status under art 15A of the FC but the application has been turned down on 25 July 2011 as YMQ was not able to show that there was a valid record of the registration of the plaintiff's parents' marriage (see exh 'N-5' of encl 2); and

(k) on 17 November 2011, the plaintiff's father made another application

for citizenship under art 15A of the FC and the application has been turned down on 26 December 2012 (see exh 'N-6' of encl 2).

THE LAW ON STRIKING OUT UNDER O 18 R 19 OF THE ROC

[6] Order 18 r 19 of the ROC provides as follows:

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

(a) *it discloses no reasonable causes of action or defence, as the case may be; or*

(b) *it is scandalous, frivolous or vexatious; or …*

(c) *it is otherwise an abuse of the process of the Court;*

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be. (Emphasis added.)

(a) the above stated principles had been further emphasised in the often quoted case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 where Mohamad Dzaiddin SCJ at p 43 (MLJ); p 11 (CLJ) had said:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in *plain and obvious cases* that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it *'obviously unsustainable'* (*Attorney-General of The Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA). (Emphasis added.)

(see *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 at p 386; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at p 43, and *Gasing Height Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259 at p 268); and

(b) in the light of the above authorities, it is the duty of this court to examine the facts presented by the plaintiff to see if the case before the court is plain and obvious and or if on the face of it is obviously unsustainable.

THE ISSUES

[7] The issues for this court's determination could be stated as follows:

(a) whether the plaintiff's claim did not disclose any reasonable cause of action under arts 14(1)(b) and/or 15(2) of the FC?;

(b) whether the plaintiff's prayer for specific reliefs under art 15A is an abuse process of court?;

(c) whether the prayers sought by the plaintiff is a non-justiciable matter on which this court does not have any jurisdiction to hear as provided for under Part III, Second Schedule of the FC?;

(d) whether the final decision by the federal government has been made by the Minister as provided for under Part II, Second Schedule of the FC?; and

(e) whether on prima facie facts before this court, the plaintiff have exhausted all alternative remedy as provided for under s 44 of the Specific Relief Act 1950 (Act 137)?.

DISCUSSION OF THE ISSUES

Issue 1: Whether the plaintiff's claim did not disclose any reasonable cause of action under arts 14(1)(b) and/or 15(2) of the Federal Constitution?

[8] Before I delve into this issue, it is pertinent for me to deal with the various provisions of the relevant laws such as Chapter III of the FC, the Births and Deaths Registration Act 1957 and the rules made thereunder, the Adoption Act 1952 as well as the Legitimacy Act 1961, in order to determine if the OS ought to be struck out at this juncture or whether the plaintiff ought to be given the opportunity to ventilate his case on the merits. The relevant provisions of the law had been dealt with extensively by both learned counsel who appeared before me on the hearing dates, either in their written submissions and or during their oral submissions.

[9] As submitted before me, under the Malaysian law, there are four ways of acquisition of citizenship, by operation of law under art 14 of the FC, by registration under arts 15, 15A, 16, 16A, and 18, by naturalisation under art 19 and by incorporation of territory under art 22 *(see Part III of the FC)*.

Citizenship by operation of law

(a) Article 14 of the FC must be read together with Part II of the Second Schedule of the FC which state as follows:

Citizenship by operation of law

14 (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

(a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part 1 of the Second Schedule; and

(b) every person born on or *after Malaysia Day*, and having any of the qualifications specified in Part II of the Second Schedule.

(c) ...

(d) ...

(e) ...

(Emphasis added.)

(b) Part II of the Second Schedule of the FC provide as follows:

Part II Second Schedule

CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY

1 Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say;

(a) *every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation; and*

(b) ...; and

(c) ...; and

(d) ..., and

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph. (Emphasis added.)

[10] Based on art 14(1)(b) of the FC, read together with Part II of the Second Schedule (s 1(a)), there are two (2) requirements to be satisfied before a person can be given the status of citizenship as follows:

(a) the person must be born within the federation; and

(b) the person must be born to parents one at least of whom is at the time of the birth either a citizen or a permanent resident in the federation.

[11] As alluded earlier, it is an undisputed fact that the plaintiff was born in

Malaysia. However, the plaintiff does not fulfill the requirement that *his parent, or one of his parents* is a citizen of Malaysia or permanently resident in Malaysia as envisages by art 14 read together with Part II of the Second Schedule, for purposes of citizenship by operation of law to be granted to him.

[12] Perhaps it would be apt at this juncture to examine the defination of the word 'parent' within the context of the FC in order to satisfy if YMQ, the adoptive father of the child, fell within the defination of 'parent' as envisaged by the FC:

(a) an attempt was made by the Malaysian court in the case of *Nedunchelian v Uthiradam v Nurshafiqah Mah Singai Annal & Ors* [2005] 2 CLJ 306 to define the word 'parent' within the context of the FC as follows:

> Though under art 160(1) the singular includes the plural nevertheless the placement of the word parent in the singular clearly gives rise as to whether it was intentionally inserted as such to be read in the singular. Interestingly enough art 160B expressly states that the authoritative text of the Constitution is the Bahasa text and hence when the equivalent term of parent which is 'ibu bapa' in the Bahasa text is construed it invariably is interpreted in the singular sense as the plural sense would be kedua ibu bapa in the Bahasa text. That being the case the intention of the framers of the Constitution in placing the word parent in the singular clearly intended it to be such.

(b) in the case of *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648; [2004] 2 CLJ 416 the court had quoted the definition of 'parent' from *Black's Law Dictionary Abridged* 6th Ed (Centennial Edition 1891–1991) to mean 'the lawful father or mother of a person';

(c) the proposition in law provides that, lawful parent refers to the *biological* father and mother in a valid marriage. This is based on s 13 of the Births and Deaths Registration Act 1957 which states as follows:

> *13 Provisions as to father of illegitimate child.*
>
> Notwithstanding anything in the foregoing provisions of this Act, in the case of an *illegitimate child*, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother. (Emphasis added.)

(d) based on the reconciliation of the relevant laws pertaining to acquisition of citizenship by way of operation of law, it would appear the plaintiff in this case had not satisfied the requirement of art 14(1)(b) of the FC to be conferred with the status of citizenship by operation of law;

(e) it is also pertinent for me to consider the provision of s 3 of the Legitimacy Act 1961(Act 60) to determine if the plaintiff is entitled as of right to be conferred with the status of citizenship by operation of law. Section 3 of Act 60 provides as follows:

> *3 (1) Nothing in this Act shall operate to legitimate a person unless the marriage leading to the legitimation was solemnized and registered* in accordance with:
>
> (a) the Civil Marriage Ordinance 1952 [Ord No 44 of 1952], or the Christian Marriage Ordinance 1956 [Ord No 33 of 1956];
>
> (b) the Christian Marriage Ordinance [Cap 24] or the Marriage Ordinance 1959 [Ord No 14 of 1959], of Sabah; or
>
> (c) the Church and Civil Marriage Ordinance [Cap 92] of Sarawak;
>
> or any Enactment or Ordinance repealed by any of the said Ordinances. (Emphasis added.)

(f) for the purpose of s 3 of Act 60 which relates to the issue of legitimacy of a person, in this case the plaintiff is one, reference would have to be made to s 17, Part III, Second Schedule of the FC which states as follows:

> 17 For the purpose of *Part III of this Constitution references* to a person's father or *to his parent, or to one of this parents,* are in relation to a person who is *illegitimate to be construed as references to his mother*, and accordingly section 19 of this Schedule shall not apply to such a person. (Emphasis added.)

(g) as shown in exh Y-1 of encl 2 the information specified therein, the plaintiff's biological father is a Malaysian citizen and his mother is an Indonesian citizen;

(h) as the plaintiff had not made any averment pertaining to the status of his parents' marriage and or provided evidence that both his biological parents had been legally married and or provided evidence that the provision of s 3 of Act 60 had been satisfied, the plaintiff is deemed to be an illegitimate person under the law;

(i) as the plaintiff comes within the category of an illegitimate person, s 17 of Part III of the Second Schedule of the FC must automatically operate and to be read together with art 14(1)(b) of the FC and s 1(a) of the Second Schedule of the FC. The justification of such reading is in compliance with art 31 of the FC. Article 31 of the FC provides:

> *Application of Second Schedule*
>
> Until Parliament otherwise provides, the supplementary provisions contained in *Part III of the Second Schedule shall have effect* for the purpose of this Part. (Emphasis added.)

(j) the court was faced with the same circumstances and similar issues in the case of *Foo Toon Aik (suing on his own behalf and as representative of Foo*

Shi Wen, child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia [2012] 9 MLJ 573 and in resolving the issue posed for the court's determination Her Ladyship Justice Rohana Yusoff held as follows:

(1) *Before a person can qualify as a citizen by operation of law, he must be born to a lawful parent under* art 14 of the Constitution. The word 'parent' in art 14 *must refer to lawful parent. The child here could not qualify as a citizen by operation of law because he was not born to a lawful parent (see paras 10–11).*

(2) *The emphasis of the requirement under* art 14 *has to be placed on his birth status because* art 14 *clearly refers to the fulfilment of the requisite conditions at the time of his birth.* It could not be disputed that his birth status did not qualify him to be a citizen by operation of law (see para 11).

(3) *Pursuant to s 17 of Part III of the Second Schedule of the Federal Constitution,* in a case of an illegitimate child, as in this case, *the word parent refers to his mother and not the biological father, the Plaintiff* (see para 18). (Emphasis added.)

(k) it is apparent from the facts that were presented there is no evidence of a valid marriage and or a solemnisation having taken place between the plaintiff's parents under any recognised law, the plaintiff therefore had obviously not satisfied the requirement under the relevant laws that I had discussed above to be qualified as a citizen of Malaysia by operation of law;

(l) relying on the provisions discussed above, the phrase in s 1 of the Second Schedule of the FC *whose parents one at least* must be substituted with the word *mother*. It is crystal clear that at the time of the plaintiff's birth the plaintiff's mother as stipulated in the birth certificate is an Indonesian citizen and not a Malaysian citizen or permanent resident of Malaysia. Thus, as the reference is made to the plaintiff's biological mother, art 14(1)(b) of the FC will not at all operate for the benefit of the plaintiff;

(m) guided by the case of *Foo Toon Aik* and on the documents that were presented by the plaintiff through the various affidavits filed herein, the plaintiff had not disclosed to this court that he had a reasonable cause of action in justifying the relief sought for under art 14(1)(b) of the FC;

Whether citizenship could be required pursuant to an adoption order

(n) the plaintiff had also sought citizenship status pursuant to art 14(1)(b) of the FC using the adoption order obtained by YMQ. The plaintiff's argument revolved around the fact that the word parent encompasses the adopter as the parent of the adopted child. Learned counsel for the plaintiff had contended that pursuant to s 9 of the Adoption Act 1952 (Act 257) all rights pertaining to the child had been

transferred and vested on the adopted father upon the adoption order having been granted by the court, including the status of his citizenship;

(o) the provisions which I had highlighted above could not be reconciled in the manner that was submitted by the plaintiff, as citizenship to be granted by operation of law related back only to the biological parental lineage. The plaintiff in this case had not fulfilled the requirement of the law. Article 14(1)(b) of the FC and s 1(a), Part II of the Second Schedule of the FC cannot be read in isolation especially when there is glaring and conclusive facts pertaining to the plaintiff's biological parents' status of marriage and or solemnisation and or registration of marriage. The plaintiff's birth certificate clearly disclosed the information of the plaintiff's birth parents, his biological father and biological mother being Malaysian and Indonesian citizen respectively;

(p) the adoption order could not in any way be stretched to confer citizenship status by operation of law on the plaintiff. The specific law on citizenship is the FC, which had clearly provided specific provision on how a person could acquire citizenship by operation of law. It would appear by relying on his status as an adopted son of YMQ to claim citizenship by operation of law, the plaintiff herein, is trying to circumvent the specific process and procedures that have been provided in the law;

(q) the Adoption Act 1952 (Act 257) relates to the right and control an adopted father has over his adopted child. However, the adoption order does not at all confer the status of citizenship on the plaintiff. This is due to the fact that there is a specific law, the FC, which deals with the issue concerning citizenship so any matters concerning citizenship should be read and construed within the four corners of the FC. The power relating to citizenship must therefore be vested to the federal government and Minister of Home Affairs;

(r) the requirement for a person to be granted as an adopter to a child is definitely different from one another as stipulated in s 6 of the Adoption Act 1952 (Act 257):

> The Court before making an adoption order shall be satisfied:
>
> (a) that every person whose consent is necessary under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;
>
> (b) that the order if made will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child;

(c) that neither the Plaintiff nor the parent or guardian has received or agreed to receive, and that no person has made or given, or agreed to make or give to the Plaintiff or the parent or the guardian any payment or other reward in consideration of the adoption except such as the Court may sanction; and

(d) that there has been a substantial change in the circumstances, if it appears that the Plaintiff has made a previous application under this Act in respect of the same child.

(s) in the event this court were to grant citizenship status as prayed for by the plaintiff in prayer 1 of the plaintiff's application, this would clearly violate the clear provisions of art 14(1)(b) of the FC and the provisions of Part II and Part III of Schedule II of the FC;

(t) The very issue was discussed in the case of *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573; [2012] MLJU 205 whereby Her Ladyship Justice Rohana Yusof (as Her Ladyship then was) in the course of Her Ladyship's judgment made the following observation on the effect of Adoption Act 1952 vis a vis the provision of art 14 of the FC:

[20] It is pertinent to note that there is no specific mention on the implication of the adoption order on the child and his adoptive parents (as laid out in s 9), covers a whole range of rights of an adopted child in relation to parental rights, future custody, maintenance, education including rights to appoint guardian, consent in relation to marriage. *The law is silent on matters of citizenship of an adopted child. In my view without any expressed provision in the law to say that an adoption order has implication on the citizen of the adopted child, such implication cannot be simply read into the law.*

[21] The objective of the deeming provision made to the adoptive child is clear. It is only for the purposes stipulated under s 9 *and no more. For that reason in my view, it cannot be extended to* Art 14. *Furthermore, the deeming provision cannot change the birth status of an adopted child.* His birth status as envisaged by Art 14 remain the same, despite the adoption order, because the deeming provision is only for the purposes enumerated under s 9 of the Adoption Act.

[22] In the same light Art 14 *does not make specific reference as to whether an adopted child can be treated as being born to a lawful parent for the purpose of* Art 14. *Thus it would be inappropriate to infer or to imply that an adoption order also deems an adopted child to be a natural child for purpose of citizenship status when both the Adoption Act and the constitutional provisions are silent on the same. It is my considered view that the, adoption order in this case therefore cannot be read to affect the citizenship of the adopted child, in absence of clear written provision in the law.*

[24] … It must be noted that Art 14 *read together with Second Schedule Part II s 1(a) lays down the requisites of a citizen by operation of law in very clear term. A person who meets all the criteria therein would qualify to become a citizen*

under that provision. There is no room to exercise for any discretion to be employed under Art 14. *The test to be applied whether a person qualifies all the necessary requirement of* Art 14. *Once the requisite conditions under these provisions are met, it is automatic that a person is a citizen by operation of law.*

[25] It is a fact at the time of the birth he did not have a lawful parent. It is clear that there is no expressed provision under the Adoption Act to deem him to be born in a lawful parent for purpose of his citizenship. That being so in my considered view the adoption order cannot therefore qualify him to become a person who was born to a lawful parent at the time of his birth as envisaged by Art 14(1)(b) *read together with Second Schedule Part II s 1(a). Had the legislation intended for such a proposition either the Federal Constitution or the Adoption Act would have addressed this clearly in the respective laws.* Since there is no provision in the Federal Constitution that provide for the implication of adoption order on Art 14, in my view it would be wrong for us to try and supplement it by mere deduction. Premised on all the above reasons the application by the Plaintiff would have to be dismissed. (Emphasis added)

(u) upon reconciliation of the relevant provisions of the laws, which I had highlighted above, I find no reason to disagree with Her Ladyship on the interpretation of law, which relate to citizenship as enunciated in the above quoted case. I am of the view that since there is no express provision in the FC to confer citizenship upon his adoption, the plaintiff could not stretch the FC and or the Adoption Act to insist that he be granted citizenship. As the law is silent on matters pertaining to citizenship of an adopted child in the FC and or in the Adoption Act, I am of the view that citizenship could not be conferred on the plaintiff merely because he had been adopted by a Malaysian adopted father. Without any expressed provision in the law to say that an adoption order has implication on the citizen of the adopted child, such implication cannot be simply read into the law. This would tantamount to adding words into the Legislature, which Parliament in its wisdom had no intention to do so (see the case of *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114);

(v) further YMQ being the adoptive parent is not the lawful parent within the meaning of art 14 of the FC. The provision under art 14 of the FC requires the birth parents, the biological mother and or father of the said child to be lawful parents for the purpose of citizenship. The absence of specific law to connect the adoption order of the said child to the requirements provided for under art 14(1)(b) of the FC will render the order applied by the plaintiff as frivolous and vexatious and a clear abuse of the process of the court;

(w) the position and status of an illegitimate child had been discussed at length in an old case of *Re D (an infant)* [1959] 1 QB 229 at p 236 as follows:

> *The judge has asked what advantage is gained by making an adoption order. In property matters there are several potential advantages. An illegitimate child, according to the old common law, was a child of nobody, so that if the mother, grandmother or grandfather died without making a will, none of their property would ever got to the illegitimate child, because it was no relation in law to them. It was of no kin to anyone.* If money was left to children by will it did not go, as a rule, to an illegitimate child, since the word 'children' was nearly always construed as referring only to legitimate children. That old law has been altered in a very small part, by section 9 of the Legitimacy Act, 1926. Now, if the mother of an illegitimate child dies without leaving a will, and has no legitimate children, the illegitimate child can take as next-of-kin of the mother. That is the only alteration. In all other respects, the old law remains. If the mother of an illegitimate child marries and has legitimate children, the illegitimate child is still excluded on an intestacy: whereas, if an adoption order is made, the illegitimate child ranks equally with the other legitimate children, the illegitimate child ranks equally with the other legitimate children ...
>
> *The judge seemed to think that by making an adoption order the child is rendered legitimate. That is not the case. Illegitimacy and adoption are entirely different matters. The child remains illegitimate, but, being adopted, it becomes in law for all purpose a child of its mother and suffers none of the disabilities which attach to illegitimacy.*
>
> Furthermore, as Ormerod LJ pointed out, the child, when adopted, is registered in the Adopted Children's Register, and that entry is received in evidence as if it were an entry in the Register of Births; so that if an application has to be made for the child to go to a school, or any other place where the entry is necessary, the entry in the Adopted Children's Register can be used.
>
> Thus it seems *clear to me that there are clear advantages to the child if an adoption order is made ... All the circumstances must be taken into account; but it certainly no bar that the child is illegitimate.* (Emphasis added.)

(x) from the above authority, it is clear that the legitimacy status of an illegitimate child would not be altered, as illegitimacy and adoption are entirely different matters;

(y) on reading s 9 of Act 257 and guided by the above quoted cases and relevant laws as discussed above there is nothing to indicate that the plaintiff is entitled to be conferred the status of citizenship by virtue of him being an adopted child of YMQ; and

(z) Section 9 of the Adoption Act merely covers issues pertaining to the maintenance, education, welfare and property of the child. However, s 9 made no mention pertaining to the citizenship of the child upon his adoption pursuant to an adoption order. On the issue of citizenship, I am of the view that no matter how far one were to stretch the effects of the provision of s 9 of the Adoption Act 1952, one will not be able to interprete s 9 of the Adoption Act 1952 as the section which confers

citizenship on the adopted child. As discussed above in so far as citizenship in concerned one has to fall back to the specific law, which regulate citizenship, the FC, as the FC did not provide for conferment of citizenship upon an adoption order having been made by the court. Section 9 could not be stretched to include conferment of citizenship. As the issue of citizenship is an important and sensitive issue, parliament in its wisdom would have expressly provided for the same if it was the intention of parliament to confer citizenship on the adopted child vide an adoption order. The plaintiff's reliance on s 9 of the Adoption Act had no merits. Therefore, this point of contention is doomed to fail and ought to be dismissed by this court.

ARTICLE 15(2) OF THE FC

[13] The next issue for determination is whether the plaintiff has proven on prima facie that he has a reasonable cause of action against the defendants under art 15(2) of the FC.

(a) Article 15(2) of the FC states:

> 15 (1) ...
>
> (2) Subject to Article 18, the Federal Government may cause any person under the age of twenty-one years of *whose parents one at least is (or was at death) a citizen* to be registered as a citizen upon application made to the Federal Government by his parent or guardian. (Emphasis added.)

(b) In the OS, the plaintiff had failed to show that there is reasonable cause of action for the plaintiff to be registered as a Malaysian citizen under art 15(2) of the FC.

(c) As discussed above for the purpose of the application of s 3 of Act 60 and s 17, Part III, Second Schedule of the FC and having reconciled, the definition of *'parents one at least'* in art 15(2) the only reasonable interpretation of *'parents one at least'* must be substituted and to be read as mother of the plaintiff. Therefore, the plaintiff is undeniably an illegitimate person under the law.

(d) The plaintiff's status of citizenship could not be considered under the said provision as the biological mother had never married the plaintiff's biological father in the first place and or his parents' marriage was not registered at the time of the plaintiff's birth and or that his status had been legitimated pursuant to Act 60.

(e) Guided by the case of *Foo Toon Aik* cited above the reference of parents in the FC must be lawful parents of the plaintiff at the time of the plaintiff's birth.

(f) In the light of the above reasonings it is obvious that arts 14(1)(b) and

15(2) of the FC could not be invoked by the plaintiff to claim for citizen of Malaysia by operation of law. Therefore, the plaintiff's application for declarations that he is a citizen by operation of law or by registration is obviously unsustainable. The plaintiff had failed to provide evidence to show he had a reasonable cause of action under the above mentioned provisions of the law.

Issue 2: Whether the plaintiff's prayer for specific reliefs under art 15A is an abuse of the process of court and whether the plaintiff has no reasonable cause of action against the defendants?

Issue 3: Whether the prayers sought by the plaintiff is a non-justiciable matter on which this honourable court does not have any jurisdiction to hear as provided for under Part III, Second Schedule of Federal Constitution?

Issue 4: Whether the final decision by the federal government has been made by the Minister as provided for under Part II of the Second Schedule, Federal Constitution?

[14] Article 15A of the FC relates to citizenship by way of registration.

Article 15A provides as follow:

Special power to register children

15A Subject to Article 18, the Federal Government may, in such special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen. (Emphasis added.)

[15] Pursuant to art 15A of the FC, the federal government which power is being exercised by the minister, is vested with the discretion in such special circumstances to cause a person under twenty-one (21) years to be registered as a citizen as the federal government thinks fit.

[16] As discussed above in respect of art 14(1)(b) and art 15(2) of the FC, art 15A of the FC too must be read together with art 31 of the FC as art 15A of the FC comes within the ambit of the provisions of Part III of the FC. Article 31 of the FC provides for the application of *Part III of the Second Schedule of the FC* as follows:

PART III

[Article 31]

A SUPPLEMENTARY PROVISIONS RELATING TO CITIZENSHIP

(1) The functions of the Federal Government under Part III shall be exercised by such Minister of that Government as the Yang di-Pertuan Agong may from time to time direct, and reference in this Schedule to the Minister shall be construed accordingly.

B

(2) A decision of the Federal Government under Part III shall not be subject to appeal or review in any court.

(4) The *Minister may delegate* to any officer of the Federal Government or, with the consent of the Ruler or Yang di-Pertua Negeri of any State, to any officer of the C Government of that State, *any of his functions under Part III of this Constitution* or this Schedule relating to citizenship by registration and the keeping of registers, and, in relation to orders under paragraph (c) of Clause (1) of Article 25 or under Article 26, any of his functions under Article 27 prior to determining whether to make such an order; *but any person aggrieved by the decision of a person to whom the functions of* D *the Minister are so delegated may appeal to the Minister.*

(6) Subject to Federal Law, the Minister may make rules and prescribe forms for the purpose of the exercise of his functions under Part III and this Schedule. (Emphasis added.)

E

[17] It is apparent from the above cited provision the functions of the federal government is exercisable by the minister who is also vested with the powers to delegate his functions to any officer of federal government for purposes of citizenship by way of registration under art 15A of the FC. There is also a F mechanism in place for any persons who are aggrieved by the decision of the federal government under this article to appeal to the Minister. This provision too had ousted the jurisdiction of the court to interfere with the decision of the federal government either by way of appeal or review.

G **[18]** Matters pertaining to citizenship under this provision had been held to be matters concerning public policy. The rights and ministerial discretion in granting Malaysian citizenship rest solely with the federal government. This principle had been reinforced through the judgment of His Lordship Hashim Yeop Sani in *In Re Meenal w/o Muniyandi* [1980] 2 MLJ 299 where the learned H judge made the following remarks in an application for citizenship under art 15(1) of the FC:

The laws on *citizenship* and immigration rest solely on questions of *public policy*. (Emphasis added.)

I

[19] The Federal Court had also reinforced the importance of the public policy element to be considered in *Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156, a case involving an immigration matter and the said court held as follows:

> Government is the most powerful body in the country and the court should be vigilant to see that Government does not exceed its power when dealing with individuals. But at the same time we are of the opinion that the *problem of dealing with illegal immigrants is a matter of public policy to be decided by Parliament and by the Executive,* that in this matter the proper authority for enacting the necessary legislation is Parliament and that *if the Government exercises a power conferred on it by Parliament and keeps within the law, then the duty of the court is quite clear; the court should simply apply the law, no matter how harsh its effect may be on the immigrant. His remedy is then not judicial, but political and administrative …*
>
> Under the Immigration Ordinance, *only the Executive has power to release the appellant. Whether or not the Executive should do so is a matter of policy for them. They have information and sources of information not available to the court and are moved by political, economic, social and cultural considerations which the court is not well equipped to apply, and judges should be slow to embarrass them into any course of action.* (Emphasis added.)

[20] In the case at hand, only the federal government has the sole discretion to grant citizenship by way of registration under art 15A of the FC. The granting of citizenship is based on the policies of the federal government and subject to the sole discretion, whether they are political, economic, social and cultural considerations. Therefore, this court is not in any position to assess such policy considerations.

[21] From the facts that were averred by the plaintiff in encls 2, 6, and 8 it would appear that the decision made vide exh Y-6 in encl 2 dated 30 September 2011 and 15 January 2013 respectively were in fact made by the Secretary General of Ministry of Home Affairs. Therefore, there is an avenue provided under the provision as discussed above for the plaintiff to appeal to the minister, which is still pending. Hence, the plaintiff in this case has not exhausted the alternative remedy provided by the law before filing this OS.

WHETHER ALTERNATIVE REMEDY AVAILABLE

[22] The provision under s 2, Part III of the Second Schedule of the FC has provided a mandatory provision that 'no appeal or review can be made against the federal government's decision'. Hence, the decision on the appeal by the minister made on behalf of the federal government is a final decision. In the present case, the plaintiff had not shown that there was in fact a decision made by the Minister.

[23] In the case of *Kuluwante (An Infant) v Government of Malaysia & Anor* [1978] 1 MLJ 92 at p 95 whereby His Lordship Justice Yusoff in dealing with the case concerning an application for citizenship by way of registration under art 15 of the FC had aptly made observation on the effect of s 4 of Part III of the Second Schedule, which excludes the jurisdiction of the court to entertain a

claim for declaration of citizenship under Part III of the FC. Therefore, the OS filed by the plaintiff is premature. If there is an adequate remedy available, the court would normally decline the relief by way of a declaration sought by the plaintiff in this case.

(See *Kuluwante (An Infant) v Government of Malaysia & Anor* [1978] 1 MLJ 92; *Metal Industry Employees Union v Registrar of Trade Unions & Ors* [1976] 1 MLJ 220)

[24] The decision under Part III of the FC, is a matter which is non-justiciable as provided under s 2, Part III, Second Schedule of the FC . The court would not entertain an application if the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable (see *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927).

[25] The relief sought by the plaintiff is discretionary in nature and the plaintiff has the duty to show that the plaintiff has exhausted all the avenues provided by the specific provisions pertaining to the relief sought before applying to court.

[26] Hence, the relief sought under art 15A of the FC is an abuse process of court as it is a non-justiciable matter on which this court does not have any jurisdiction to hear as discussed above.

(See *Lembaga Lebuhraya Malaysia v Cahaya Baru Development Berhad (Dissenting avail MLJU (09) 0523)* [2009] MLJU 546; *Ketua Pengarah Buruh v Britania Brands (Malaysia) Sdn Bhd* [2010] MLJU 504).

CONCLUSION

[27] In the light of the above reasoning, I am satisfied that this is a proper case for this court to exercise its power under O 18 r 19 of the ROC to strike out the originating summons with costs of RM1,000 to be awarded to the respondents.

Plaintiff's originating summons struck out.

Reported by Afiq Mohamad